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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re E.I. et al, Persons Coming Under the  
Juvenile Court Law.

B237311

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

(Los Angeles County  
Super. Ct. No. CK89323)

Plaintiff and Respondent,

v.

GLORIA S.,

Defendant and Appellant.

APPEAL from orders of the Los Angeles County Superior Court.

Stanley Genser, Commissioner. Reversed.

Cristina Gabrielidis Lechman, under appointment by the Court of Appeal, for  
Appellant.

Office of the County Counsel, John F. Krattli, Acting County Counsel, James M.  
Owens, Assistant County Counsel, and Melinda S. White-Svec, Deputy County Counsel,  
for Respondent.

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The juvenile dependency court made jurisdictional orders which included findings that Gloria S. (Mother) failed to protect her children from harmful conduct at the hands of R.I. (Father). Mother appeals. We reverse the findings that Mother failed to protect her children; our decision does not affect the court's jurisdiction over the children based upon Father's conduct.

## **FACTS**

Father and Mother are the parents of two children, daughters: E.I., born in July 2004, and J.I., born in April 2007.

On July 13, 2011, Mother called the Los Angeles County Department of Children and Family Services (DCFS or the department) and reported that Father had hit E.I. with a belt. According to Mother, Father had a history of substance abuse and domestic violence against Mother. The last incident occurred about a year earlier. Father had gotten upset when E.I. did not want to go to soccer practice. E.I. started crying and ran under the kitchen table as Father hit E.I. with a belt. Prior to this incident, Mother had spoken to Father about ending their eight-year marriage. Mother, a registered nurse, was looking for an apartment she could afford on her own. Mother said that she decided to call in the report to DCFS "to make sure that the incident with her husband [and E.I.] would be addressed."

On July 21, 2011, a DCFS social worker went to the family home to investigate Mother's referral. The social worker interviewed Mother, Father and E.I., then prepared a "safety plan" which was "put into place" by having both parents sign the arrangements. The plan provided that the parents would refrain from using corporal punishment, enroll in domestic violence classes, and complete an Upfront Assessment ("UFA") for services. The plan required Father to enroll in a substance abuse program.

On July 25, 2011, Mother called the social worker to report that some incidents occurred over the weekend. The parents went out to dinner and Father drank alcohol. He took Mother to a motel and tried to force her to have sex. Mother started screaming and demanded they go home. When Mother went to work the next day, Father showed up with the children in the car. He was intoxicated. Mother took the keys away from Father

and drove the children to their maternal grandmother's home. Mother then went to the local police station and obtained a temporary restraining order (TRO) against Father. Mother stayed at the maternal grandmother's home with the children until Father was served with the TRO.

DCFS completed the UFA in early August 2011. The UFA provided that Mother should be referred to individual, family and couples' counseling to address issues involved in separating appropriately from Father, including helping their children address the disruption in the family structure. Further, the UFA recommended that Mother attend domestic violence classes to help her understand her role in the "cycle of violence" and how to avoid it in the future. The UFA recommended parenting classes. Mother stated she would participate in any court-ordered program.

On August 12, 2011, DCFS filed a petition on behalf of E.I. and J.I.<sup>1</sup> DCFS's accompanying detention report indicated that the children were up-to-date on their immunizations, lived in a clean and well-organized home, and were both in school and progressing satisfactorily. The report included the social worker's statements that Mother was an "advocate for her children," and "took action to protect her children from harm . . . by obtaining a restraining order [against] father." The report set forth evidence establishing the facts summarized above, and included the following conclusions and assessments from the social worker: "It appears appropriate to leave the children in the care of [Mother], due to Mother taking protective action." "[I]t is . . . recommended that continued detention from the father and placement of the children in the mother's home is necessary to protect the children's safety."

Despite the stated circumstances, the petition described Mother as an offending parent, primarily on allegations she had failed to protect the children from Father's bad conduct. Pursuant to section 300, subdivision (a), "serious physical harm," the petition alleged Father physically abused E.I. on July 12, 2011 by striking her on the back and

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<sup>1</sup> See Welfare and Institutions Code section 300. All further section references are to the Welfare and Institutions Code unless otherwise noted.

legs with a belt and that on prior occasions Father struck E.I. with belts and a key. The petition alleged that Mother and Father had a history of engaging in violent physical altercations in the children's presence and that, on July 22, 2011, Father was physically, sexually and verbally abusive to Mother. The petition alleged that Mother failed to protect the children by continuing to allow Father to live in the home and have unlimited access to the children. The petition alleged that Mother knew of the abuse and failed to protect the children, thus endangering their physical health and safety. Pursuant to section 300, subdivision (b), "failure to protect," the allegations set forth above were re-alleged with the additional allegation that Father had a history of alcohol abuse which Mother knew about and from which she failed to protect the children. Finally, pursuant to section 300, subdivision (j), "abuse of sibling," the petition alleged that Father's physical abuse of E.I. on July 12, 2011, which Mother knew about and failed to protect her from, put J.I. at risk of physical harm.

On August 12, 2011, the dependency court detained the children, and ordered them released to Mother. The court issued a restraining order against Father, and ordered his visits to be monitored. On September 21, 2011, at Mother's request, the court issued a three-year permanent restraining order against Father.

On September 21, 2011, DCFS filed its jurisdiction/disposition report. The report included statements from the social worker that during the course of the investigation it initially appeared that Mother could protect the children from Father. However, the social worker noted that Mother had called her on July 25, and reported that Father tried to rape her and had driven the children in a car while under the influence of alcohol. The social worker also expressed concern about Mother's ability to protect E.I. and J.I. because they told the social worker that Father hit them in the past with a belt and Mother knew about it. When asked about such incidents, Mother stated that Father hit E.I. with a belt only the one time she reported, and that she had tried to intervene. The social worker opined that Mother appeared to be "minimizing" the physical abuse of the children, but also stated that Mother had shown a willingness to protect the children from Father by ending their relationship and obtaining a restraining order. The social worker believed

that the children could safely remain in Mother's care, while Father would benefit from family reunification services.

In last-minute information filed with the court on November 3, 2011, the social worker reported that Mother had ongoing concerns for her own safety and was fearful of Father. Mother reported other prior incidents with Father where he had dragged her out by her feet into the living room in the middle of the night, rifled through her purse, taken her cell phone, yelled at her and raped her. The social worker said that Mother initially stated there had only been three incidents of domestic violence between Father and Mother over the course of their relationship, but that the new information from Mother suggested that the domestic violence was "significantly different" from what Mother had first said. This caused the social worker to have "further concern about Mother's ability to protect the children from the Father without DCFS and Court supervision."

At the conclusion of a joint adjudication and disposition hearing on November 3, 2011, the dependency court found all counts in the petition to be true. The court placed the children with Mother. The court ordered dispositional plans, the terms of which are not relevant to the current appeal.

Mother filed a timely notice of appeal the same day.

## **DISCUSSION**

### **I. Substantial Evidence**

Mother contends the dependency court's jurisdictional findings as to her must be reversed because they are not supported by substantial evidence. She contends review is appropriate as the findings may adversely affect her personal and professional interests. We agree the court's finding should be modified as to Mother.

As a preliminary matter, we address the general rule that a jurisdictional finding properly adjudging a minor to be dependent of the dependency court based upon the acts of either parent, alone or together, brings a child within of the statutory definition of a dependent child. (See, e.g. *In re Alysha S.* (1996) 51 Cal.App.4th 393, 397.) Under this rule, Mother's jurisdictional challenge would ordinarily accomplish little as there is no claim that the evidence fails to support the dependency court's jurisdiction over the

children based on Father's bad acts. Despite the general rule, however, reviewing courts have addressed parents' sufficiency-of-the-evidence challenges to jurisdictional findings in dependency proceedings under certain limited circumstances. Such challenges have been addressed, for example, where initial findings could affect further orders in a dependency proceeding itself, or where findings may adversely affect a parent's interests without undermining the best interests of a dependent child. (See *In re John S.* (2001) 88 Cal.App.4th 1140, 1143; and see also *In re Anthony G.* (2011) 194 Cal.App.4th 1060, 1065-1066.) DCFS recognizes the availability of parental appellate review in the abstract, but argues Mother's appeal here need not be addressed because she has not shown any actual prejudice from the dependency court's jurisdictional findings. We are satisfied that the potential adverse affects on Mother in the current dependency proceedings are sufficient to justify appellate review.<sup>2</sup>

In addressing a claim on appeal that a lower court's findings are not supported by substantial evidence, we apply well-settled standards of review. We resolve all conflicts in the evidence in favor of the lower's court's findings, and may not reweigh the evidence nor re-assess the credibility of the evidence. (*In re Precious D.* (2010) 189 Cal.App.4th 1251, 1259.) With this standard in mind, we turn to Mother's claims the evidence does not support the findings as to her.

**A. The findings as to Mother under section 300, subdivisions (a) and (b)**

The dependency court's jurisdictional findings under section 300, subdivisions (a) and (b), that Mother failed to protect her children from Father's bad acts, are not supported by substantial evidence. The undisputed evidence in the record on appeal shows the family came to DCFS's attention when *Mother* initiated a report after Father hit E.I. with a belt and that Mother called DCFS "to make sure that the incident with [Father and E.I.] would be addressed." A week before the belt incident, Father hit E.I.

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<sup>2</sup> Mother asserts that, "[o]n the basis of the sustained petition, [she] is now listed in the California Department of Justice's "Child Abuse Central Index" or CACI. (See Pen. Code, § 11170.) However, we see no actual indication in the record on appeal definitively showing that a report concerning Mother is now listed in the CACI.

with the lanyard of his keys, and Mother warned him that if he ever did anything like that again she would call law enforcement. In response to Mother's first contact with the department, DCFS set up a safety plan. A few days later when Father drove intoxicated to Mother's work with the children in the car, Mother took Father's car keys and drove the children to their maternal grandmother's home. Even before DCFS filed the petition on behalf of the children, Mother obtained a restraining order against Father and separated from him. In addition, DCFS's initial reports repeatedly acknowledged that Mother had taken action to protect her children. It is apparent that Mother has acted to protect her children.

DCFS's position concerning Mother's appeal appears to be that the evidence in the record supports the conclusion that Mother did "too little, too late," thus supporting the dependency court's jurisdictional findings as to Mother. We view the evidence differently. The evidence shows the children were up-to-date on immunizations, lived in a clean and well-organized home, and were in school. There is no evidence in the record to show Father ever seriously injured either of the children, or that Mother ever left the children in Father's care while he was under the influence of alcohol. Normally, Mother had the maternal grandmother babysit when Mother had to work. Mother initiated a referral after the belt incident, and DCFS put in place a safety plan. The incident shortly thereafter where Father drove the children in a car while intoxicated occurred after he picked them up from the maternal grandmother's home. Mother responded appropriately and protectively by obtaining the restraining order on her own, and reporting the incident to DCFS.

It is correct, as DCFS notes on appeal, that the record discloses evidence showing E.I. and J.I. made reports to the social worker that Father had hit them before the most recent belt incident involving E.I., and that Mother knew about it. However, we believe this evidence does not overcome the evidence of Mother's acts to protect her children. DCFS also notes there is evidence showing Mother belatedly provided evidence of other domestic abuse by Father against her. We believe the evidence that Mother provided added material over a short time frame does not negate her actions in protecting the

children. In summary, the evidence refuting the showing that Mother protected the children does not amount to substantial evidence supporting a conclusion that she failed to protect her children. The record shows instead that Mother acted to protect her children, and that she is being deemed an offending parent for having done so. Referrals such as are involved in Mother's current situation should be encouraged.

**B. The findings as to Mother under section 300, subdivision (j)**

The dependency court's finding under section 300, subdivision (j), that Mother's failure to protect E.I. from Father shows J.I. is also at risk of harm, is also not supported by substantial evidence. Section 300, subdivision (j), provides that a child is within the dependency court's jurisdiction when the child's sibling has been abused or neglected as defined in section 300, subdivision (a), (b), (d), (e), or (i), and there is a substantial risk that the child will be abused or neglected in a similar manner. Applied here to Mother, section 300, subdivision (j), basically required evidence showing that there was a substantial risk that Mother's failure to protect E.I. would lead to abuse or neglect of J.I.

When determining whether there is a substantial risk to one child based on abuse or neglect of the child's sibling, the dependency court must consider the circumstances surrounding the abuse or neglect of the sibling, the age and gender of each child, the nature of the abuse or neglect of the sibling, the mental condition of the parent or guardian, and any other factors the court considers probative. (§ 300, subd. (j).)

Moreover, section 300, subdivision (j), applies only when there is "a current risk of abuse." (*In re Carlos T.* (2009) 174 Cal.App.4th 795, 803.) Although evidence of past conduct may be probative of current risk conditions, the past infliction of physical harm by a caretaker, standing alone, does not establish a substantial risk of current physical harm. Instead, there must be some evidence to support a reasonable belief the acts may continue in the future. (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 824.)

Here, Mother obtained a restraining order and left Father prior to the dependency court's findings under section 300, subdivision (j). There is no evidence to support a finding that the failures, if any, of Mother as to E.I. portend a possibility that J.I. is at risk of suffering harm. (*In re Jasmine G.* (2000) 82 Cal.App.4th 282, 289-290; *In re Rocco*

*M., supra*, 1 Cal.App.4th at pp. 821-824.) Mother’s previous acts or failures, standing alone, do not establish a substantial risk of harm.

**DISPOSITION**

The dependency court’s findings insofar as they find Mother to be an “offending parent” under section 300, subdivisions (a), (b) and (j), are reversed. Our decision does not affect the court’s jurisdiction over the children based upon Father’s conduct.

BIGELOW, P. J.

We concur:

FLIER, J.

GRIMES, J.